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Lexobumi Sdn Bhd v SK M&E Bersekutu Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12BC-7–06 OF 2016
LEE SWEE SENG J
20 MARCH 2017

C

Contract — Breach — Action for damages — Whether there was contractual obligation and duty to certify invoice — Whether contemporaneous notice to withhold payments required — Whether contractor rights to suspend work for non-payment of interim certificates

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This case began at the sessions court for breach of contract. The plaintiff's case was that the defendant's refusal or failure to certify works done and its failure to pay for said works amounted to repudiation of contract. In its defence, the defendant alleged that the plaintiff's actions of stopping work and leaving work site resulted in wrongful termination which caused the breach of contract. Accordingly, the defendant filed a counterclaim against the plaintiff. After full trial, the sessions court judge ('the SCJ') dismissed the whole of plaintiff's claim and allowed the defendant's counterclaim with interest and costs. Dissatisfied, the plaintiff appealed against that decision to the High Court. The issues for court's determination were: (a) whether the plaintiff had a right to terminate the subcontract when the defendant did not certify the works invoiced by the plaintiff and so did not pay the plaintiff according to the subcontract; (b) whether the plaintiff was entitled to claim the sum of RM294,709.17 for the work done; and (c) whether the defendant had proved its claim of damages, losses and back charges in its counterclaim against the plaintiff.

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Held, remitting the case for retrial before another sessions court judge with no order as to costs:

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(1) There was a need for the SCJ to determine if it was a lawful excuse and indeed reasonable for the plaintiff subcontractor to suspend works and finally to stop work altogether if the works they had done was refused certification by the defendant and if the defendant did not pay the plaintiff other than as and when they chose to and even then, a very patchy payment of a paltry sum. There was no valid excuse or explanation for the refusal to certify the works done as evidenced in the invoices. There was no complaint in writing that the invoices had not correctly reflected the works done and if indeed it was a case where the works were

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not done or not properly done, one would have expected a response in writing from the defendant as well as a certification for a lesser amount (see para 37).

(2) The SCJ found as a matter of fact that the plaintiff's claim for the balance sum of RM294,709.17 was not proportionate to the works carried out by the plaintiff at para 35 of her judgment. The SCJ failed to make a finding as to what then was the proper proportion of work done or the value of the work done. Assuming that the plaintiff had wrongly terminated the subcontract, it did not mean that they would not be paid for the works already carried out for which the defendant had invoiced its employer. The SCJ would still have to determine the value of the works completed by the plaintiff (see paras 38 & 49).

(3) The SCJ seemed to have been persuaded by case law that stated that if there was no objection to debit notes issued by one to the other, then one would have the basis to conclude that the amount claimed in the debit notes was correct. Those cases could be distinguished for it was in the context of on-going contractual relationship. Where the contract had been terminated one could not infer agreement to the sum claimed merely because one party had unilaterally imposed a condition that if the other party did not revert within a stated time frame, then there was a deemed admission that the sum claimed in the debit notes was correct. That would be to change the law of contract which required a consensus ad idem for there to be a contract. Based on all the findings, the decision of the SCJ could not supported by the evidence adduced (see paras 66 & 72).

(4) This was not a case where the court could make a substitute finding of the amount that could be entered for the plaintiff or for the defendant or for both of them where the claim and counterclaim was concerned. The finding of facts had to be made by a trial judge and the way the evidence had been adduced, assessed and analysed left much to be desired such that at the end of the day, the whole of the evidence adduced had not been sufficiently appreciated for the decision arrived at. It would not be tenable for the court to undertake the task of making primary findings of facts in respect of the claim and the counterclaim (see para 74).

[Bahasa Malaysia summary

Kes ini bermula di mahkamah sesyen dibawah kemungkiran kontrak. Kes plaintif adalah keengganan atau kegagalan defendan untuk membuat pengesahan bagi kerja-kerja yang telah disempurnakan dan kegagalan untuk membuat bayaran bagi kerja-kerja tersebut terjumlah kepada pembatalan kontrak. Dalam pembelaannya, defendan mendakwa bahawa tindakan-tindakan plaintif untuk berhenti kerja dan keluar dari tapak kerja terjumlah kepada penamatan secara salah telah menyebabkan pengingkaran

kontrak. Oleh itu, defendan telah memfailkan tuntutan balas terhadap plaintif. Selepas perbicaraan penuh, hakim mahkamah sesyen ('HMS') menolak tuntutan plaintif secara keseluruhannya dan telah membenarkan tuntutan balas defendan dengan faedah dan kos. Terkilan, pihak plaintif membuat rayuan terhadap keputusan tersebut ke Mahkamah Tinggi. Isu-isu yang diusulkan untuk dipertimbangan oleh mahkamah adalah: (a) sama ada plaintif mempunyai hak untuk membatalkan subkontrak apabila defendan tidak membuat pengesahan bagi kerja-kerja yang telah dikeluarkan invois oleh plaintif dan apabila bayaran tidak dibuat kepada plaintif mengikut subkontrak; (b) sama ada plaintif berhak menuntut sejumlah RM294,709.17 bagi kerja-kerja yang telah disempurnakan; dan (c) sama ada defendan telah membuktikan tuntutannya bagi ganti rugi, kerugian, dan bayaran balik dalam tuntutan balasnya terhadap plaintiff.

Diputuskan, meremit semula kes ke mahkamah sesyen untuk perbicaraan semula di hadapan hakim yang lain tanpa perintah terhadap kos:

(1) HMS perlu menentukan sama ada ia boleh terjumlah kepada satu alasan yang sah dan ianya sememangnya munasabah bagi plaintif subkontraktor untuk menggantung kerja-kerja dan akhirnya menghentikan kerja sama sekali jika kerja-kerja yang dilakukan oleh mereka tidak diberi pengesahan oleh defendan dan jika defendan tidak membuat bayaran kepada plaintiff kecuali sepertimana yang ditentukan oleh mereka dan walaupun dalam keadaan sedemikian, hanya berbentuk bayaran yang tidak tentu bagi satu jumlah kecil. Tidak ada alasan yang sah atau penjelasan bagi keengganan untuk memberi pengesahan bagi kerja-kerja yang telah disempurnakan seperti yang dibuktikan melalui invois-invois. Tidak ada aduan bertulis yang menyatakan bahawa invois-invois tidak membutirkan secara betul kerja-kerja yang telah dilakukan dan jika ini merupakan satu kes di mana kerja-kerja tidak dilakukan atau tidak disempurnakan secara betul, seseorang boleh menjangka untuk menerima satu jawapan bertulis dari defendan serta satu pengesahan bagi jumlah yang lebih kecil (lihat perenggan 37).

(2) HMS telah membuat rumusan fakta bahawa tuntutan plaintiff bagi baki yang berjumlah RM294,709.17 tidak setimpal berdasarkan anggaran kerja-kerja yang telah dilakukan oleh plaintif, di perenggan 35 penghakiman beliau. HMS gagal untuk memberikan rumusan apakah anggaran kerja yang dilakukan atau nilai kerja yang telah disempurnakan. Andai kata plaintif telah menamatkan subkontrak secara salah, ini tidak bermaksud bahawa mereka tidak akan dibayar bagi kerja-kerja yang telah dilakukan memandangkan defendan telah mengeluarkan invois kepada majikannya. HMS masih perlu menentukan nilai kerja-kerja yang telah disempurnakan oleh plaintif (lihat perenggan 38 & 49).

(3) HMS didapati telah menerima kes undang-undang yang menyatakan bahawa jika tidak ada bantahan terhadap nota-nota debit yang dikeluarkan dari satu pihak ke yang pihak lain, ini kemudiannya memberikan asas kepada sesorang untuk membuat rumusan bahawa jumlah yang dituntut dalam nota-nota debit adalah betul. Kes-kes itu boleh dibezakan atas alasan ianya dalam konteks hubungan kontraktual yang berterusan. Dalam keadaan di mana kontrak telah ditamatkan, sesiapa pun tidak boleh membuat kesimpulan bahawa jumlah yang dituntut telah dipersetujui hanya kerana satu pihak dengan sendiri meletakkan syarat bahawa jika pihak yang lain tidak menjawab dalam satu tempoh yang ditetapkan, ini merupakan satu pengakuan bahawa jumlah yang dituntut dalam nota-nota debit adalah benar. Ini akan mengubah undang-undang kontrak yang memerlukan *consensus ad idem* bagi wujudnya satu kontrak. Berdasarkan segala rumusan-rumusan, keputusan HMS tidak disokong oleh bukti-bukti yang dikemukakan (lihat perenggan 66 & 72).

(4) Ini bukan satu kes di mana mahkamah boleh membuat satu penggantian jumlah yang boleh dimasukkan bagi plaintif atau defendan atau bagi kedua-dua mereka berkenaan tuntutan dan tuntutan balas. Penemuan fakta-fakta harus dilakukan oleh hakim yang mengendalikan bicara dan dalam kes ini cara bagaimana bukti-bukti dikemukakan, dipertimbangkan dan dianalisa, amat bersifat kekurangan, di mana kesimpulannya, keseluruhan bukti-bukti yang dikemukakan tidak dihargai secara secukupnya untuk memberikan satu keputusan sebegini. Ianya adalah rumit bagi mahkamah untuk mengambil tugas untuk membuat penemuan-penemuan fakta-fakta utama berkenaan tuntutan dan tuntutan balas (lihat perenggan 74).]

Notes

For cases on action for damages, see 3(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3444–3451.

Cases referred to

Ban Hong Joo Mines Ltd v Chen & Yap Ltd [1969] 2 MLJ 83, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Canterbury Pipe Line Ltd v Christchurch Drainage Board [1979] 2 NZLR 347, CA (refd)

Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd [2014] 10 MLJ 496, HC (refd)

Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd [2004] SGHC 107, HC (refd)

KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling [2015] 7 MLJ 10, HC (folld)

Kamdar Sdn Bhd v Bipinchandra a/l Balvantrai & Ors [2016] MLJU 974; [2017] 1 CLJ 369, CA (refd)
Lubenham Fidelities & Investments Co Ltd v South Pembrokeshire District Council and Others 33 BLR 39, QBD (refd)
Sin Hong Huat Industries v Berjaya General Insurance Bhd [2014] 8 MLJ 144, HC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)

KL Wong (Yeo & Yeo) for the appellant.
Rohan Arasoo (Lynn Foo with him) (Harold & Lam Partnership) for the respondent.

Lee Swee Seng J:

[1] The plaintiff as subcontractor and the defendant as main sub- contractor had entered into a subcontract dated 9 April 2012 (pp 393–405 of the record of appeal) in respect of the 'supply, installation, coordination, testing and commissioning of ICT services system for UITM, Pasir Gudang' ('the said works') for the sum of RM1,006,145. As the defendant had wanted the works to start earlier, the plaintiff had, prior to the subcontract, entered into the site and started work since April 2011.

PROBLEM

The plaintiff progressively performed the works and had rendered the following invoices to the defendant.

Date	Amount	Found in page of the record of appeal
10 August 2012	RM26,676	pp 551–552
17 October 2012	RM42,298	pp 546–548
23 November 2012	RM72,172	pp 543–545
28 November 2012	RM11,972	pp 537–542
10 September 2012	RM32,994	
11 January 2012	RM29,430	
29 January 2013	RM28,122	pp 531–537
19 February 2013	RM48,443	pp 453–454
10 April 2013	RM41,724	pp 447–449
6 June 2013	RM45,065	p 553
Total	RM378,896	

The defendant had only made the payment of RM84,187.43 including the following payments to the plaintiff:

Date	Amount
28 May 2012	RM20,000
15 August 2012	RM11,187.43
19 October 2012	RM 8,000
6 December 2013	RM10,000
8 February 2013	RM15,000
18 April 2013	RM15,000

[2] Throughout the period when the plaintiff was doing the works, the defendant did not give any letter to dispute the quantum claimed by the plaintiff in their invoices to the defendant from 10 August 2012–6 June 2013. As the plaintiff did not receive certification for the works done save for two and as the balance outstanding remained unpaid, the plaintiff could not risk continuing further works and so eventually they stopped work altogether and sued for their losses arising out of what they said is the defendant's breach in failure to certify their work done and to pay them accordingly.

PRAYERS

[3] The plaintiff claimed the balance sum of RM294,709.17 against the defendant and also for loss of profit of RM106,632 together with interest at 5%pa on the judgment sum till realisation and costs.

[4] The defendant's defence was that the plaintiff had wrongfully terminated the subcontract by stopping works and leaving the site in December 2012 without giving any notice. It was also alleged that the plaintiff had acted in breach of the subcontract by failing to carry out and complete the works in respect of the project as agreed. It was admitted that a sum of RM84,187.43 had been paid to the plaintiff so far for preliminary works.

[5] The defendant on the other hand, counterclaimed for RM505,926.39 being damages, loss and expense due to the plaintiff's unilateral termination of the subcontract by stopping works and leaving the site without notice. The defendant also claimed interests and costs.

[6] The learned sessions court judge ('SCJ') had, after full trial, dismissed the whole of the plaintiff's claim and allowed the whole of the defendant's counterclaim with interest and costs.

[7] Against that decision the plaintiff as the appellant has appealed to this court. The parties shall be referred to by their designation in the trial at the sessions court as the plaintiff and the defendant.

PRINCIPLES

Whether the plaintiff had a right to terminate the subcontract when the defendant did not certify the works invoiced by the plaintiff and so did not pay the plaintiff according to the subcontract

[8] Contractually, it is provided vide cl 1 Part V of the subcontract (at p 404 of the record of appeal) as follows:

> Interim Payment Certification for the subcontract works shall be prepared by the Main subcontractor monthly. Save no interim payment certificate shall be prepared if there is not any significant progress of the subcontract works during that particular period.

[9] The defendant have a contractual obligation and duty to certify all the invoices rendered by the plaintiff. The interim payment certificate is to certify and/or confirm what work the plaintiff had done. The defendant had only certified two interim payment certificate dated 28 May 2012 and 23 July 2012. There was a third interim payment certificate dated 2 October 2012 but it was not handed to the plaintiff at that juncture.

[10] In this case, I find merit in the plaintiff's submission that the defendant did not even certify on time in accordance with the subcontract the plaintiff's work which leaves the plaintiff in a limbo and quandary whether its works are verified, approved and confirmed and whether he would be paid. Obviously the plaintiff was anxiously concerned whether or not the works done by him is acceptable to the defendant for without certification, there would be no payment forthcoming. True enough, the payments trickled in as and when the defendant felt like paying.

[11] The plaintiff had little choice but to accept what had been paid and they could only appeal for more prompt payment and also more importantly, a prompt and proper certification of works done so that they know where the non-compliance had been.

[12] Such a conduct of the defendant in willy nilly making payments as and when they like, did not inspire confidence in the plaintiff as a subcontractor who is out of pocket in having done the works and not having paid. What then is the plaintiff supposed to do if his works are not certified and he is not paid based on the invoices he had submitted? Must he continue to finish the whole works assigned to him and then wait for payment? That does not seem to be the position of the law.

[13] Even contractually, it is envisaged that there are circumstances when the plaintiff may validly suspend works. In cl 17(a) of the subcontract on 'Determination of subcontract by main subcontractor'; it is provided as follows:

> If the subcontractor shall make default in any of the following respects viz:
>
> (i) If without reasonable cause he wholly suspends the carrying out of the subcontract Works before Completion thereof;
>
> (ii) ...

[14] I would say that it is not unreasonable for the plaintiff to suspend works if he was not paid for the amount invoiced of RM378,896 and was only paid RM84,187.43 thus far. It is also not unreasonable for the plaintiff to do so if the defendant had persisted in not certifying the works done by the plaintiff. Even if the defendant were to certify for less than the amount invoiced, at least the plaintiff would have a rough idea as to the part of the works not so certified and hence would know the works that are being disputed.

[15] The plaintiff would then be in a position to rectify the works not done in compliance with the subcontract and have them certified in the next invoice. Here the plaintiff had set out in its invoices the details of what had been done. The details included a description of the items installed and services provided, the quantities, the unit price, the total sum and the percentage of work done. One would have expected that the defendant would then revert on which part of the works done they were disputing with respect to quantity of items installed or quality of the services provided or the calculation of the completion of the works. Nothing of that sort was forthcoming from the defendant.

[16] All the invoices and delivery orders of the plaintiff were duly acknowledged by the defendant and they contained the following terms: 'Payment term: 30 days from the date of invoice. All goods are received in good conditions'.

[17] I can do no better than to adopt the approach taken by Justice Lim Chong Fong JC (as he then was) in *KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling* [2015] 7 MLJ 10 at p 21:

> [30] As for the unit rate costing, I also prefer the testimony of the plaintiff by reason that progressive payments were received from the defendant as claimed by the plaintiff *without contemporaneous protest or challenge* on the unit rate used by the plaintiff. In fact, the defendant did not even at that material time queried or demanded for the detail method and breakdown of the plaintiff's claims. *Moreover no contemporaneous protest was made by the defendant on the written invoices of the plaintiff* dated 28 May 2007 and 18 June 2007 when the project was nearing completion ... (Emphasis added.)

[18] The learned SCJ seemed to be influenced by the fact that DW2 had testified that there were no joint site verification as the plaintiff had left the site. A far more important question would be why was there no written notices from the defendant calling for a joint site verification of works done when the defendant is contractually obliged to prepare a monthly interim payment certification. Why was there no joint site verification when the plaintiff was at the site? It is not for the plaintiff to call for a meeting of joint site verification but the duty is on the defendant to call for the meeting and to come up with the monthly interim payment certification. I cannot agree more with the plaintiff's counsel that a phone call from the defendant would have sorted out the request to meet at the site for verification. The following evidence is relevant here at p 205 of the record of appeal:

KLW:	Mr Law, I put it to you that under the subcontract you are supposed to do the interim payment certification each month to verify the accounts. Why didn't you do that?
LAW:	Kerana pihak plaintif tidak hantar sesiapa untuk pergi ke site bersama defendan untuk ...
HAKIM:	Kerana plaintif tidak hantar sesiapa untuk pergi ke site?
LAW:	Bersama defendan
HAKIM:	Bersama defendan?
LAW:	... untuk melakukan verifikasi.
KLW:	Did you give any letter to the plaintiff to the effect ask them to go and go to the site to verify with you? Yes or no? Did you give any letter?
LAW:	Tidak.

[19] Surely the subcontractor cannot be expected to fund the whole of the works and then wait upon the goodwill of the defendant as the main subcontractor to pay.

[20] The directors of the defendant ('DW1' and 'DW2') gave evidence (p 170 of the record of appeal) that the two sums of RM15,000 each paid on 8 February 2013 and 18 April 2013 was merely as an inducement to the plaintiff to continue working rather than a payment for the outstanding works.

[21] It shows a pattern on the part of the defendant in not following the subcontract:

KLW:	Mr Lee, was there any payment by the defendant to the plaintiff after December 2012?
LEE:	Ada, Puan, kami membuat bayaran pendahuluan untuk tujuan supaya plaintif kembali ke site.

[22] As there were ongoing invoices by the plaintiff on 19 February 2013, 10 April 2013 and 6 June 2013 and that there were ongoing payments by the defendant on 8 February 2013 and 18 April 2013 it is more likely than not that the plaintiff continued to do the works until then. If indeed the plaintiff had invoiced for works not done that would be fraud on the part of the plaintiff but it is not the defence of the defendant that they were invoiced for work not done.

[23] The point is plainly made that one cannot refuse to certify the works done by one's contractor and then later raise the allegation that the works were not properly done. If the defendant as the main subcontractor is exercising its right to withhold payments under cl 3 of Part V of the subcontract for all unsatisfactory work done and unreasonable claims, then they are legally obliged to state what these are so that the plaintiff may be able to properly appraise the situation. This the defendant had not done.

[24] In a case where the defendant had refused or failed to certify the works done and with that their failure to pay the plaintiff for the works done, such a conduct may amount to a repudiatory breach of the subcontract. The plaintiff had shown its intention to terminate the subcontract in its various oral representations to the defendant and finally terminated the subcontract by stopping works altogether and leaving the site.

[25] I agree with learned counsel for the plaintiff that certification of the interim payments and/or invoices and being paid on time are obviously very important matters as without payment on time, the contractor would have no confidence and more importantly, no capital to continue for the subcontract of RM1,006,145.

[26] DW1 ('Lee') and DW2 ('Law') (two directors of the defendant) admitted that the defendant did not comply with cl 1 Part V of the subcontract. DW2 ('Law') also admitted that the defendant had breached the cl 1 PART V of the subcontract at p 195 of the record of appeal:

> KLW: I put it to you that the defendant is in breach of ... this is p 17 ... in breach of Part V cl 1 of the subcontract. Do you agree?
>
> LAW: Saya setuju, tetapi plaintif membuat ...

[27] DW2 stated that the plaintiff did not go to the site to talk to the defendant to seek the interim payment certification and therefore the defendant is not in breach. Nothing could be further from the truth. There is no need for any kowtowing here. Contractually the onus and responsibility is on the defendant to do the monthly interim payment certification of the plaintiff's invoices and thereafter to make the necessary payments.

[28] There was no letter or document at all from the defendant to the plaintiff telling them they should go to the site to get the monthly interim payment certification rather than just handing the invoices to the defendant (which the defendant had acknowledged receiving).

[29] It seems incredible that the plaintiff had given the defendant more than ten invoices over a period of one year and the defendant claimed that it is the plaintiff's fault that the invoices are not certified at all other than two invoices belatedly certified. It shows the defendant's lack of bona fide and fair play in dealing with the plaintiff.

[30] The evidence of DW1 and DW2 on the one hand is that they were not in the know about the interim payment certification. DW1 at pp 173 and 193 of the record of appeal gave testimony that he did not know much about the interim payment certification and had relied on the staff.

At p 173 of the appeal record:

KLW: I put it to you there is only two interim payment certification from the defendant. Do you agree?

LEE: Saya tidak tahu kerana bukan saya yang in charge.

KLW: So nobody in the defendants office know about this interim payment now?

LEE: Setiausaha saya mungkin akan tahu.

[31] DW4 ('Queenie Tan') on the other hand at p 234 of the record of appeal contradicted this testimony when she said that the instructions on interim payment certification had come from the bosses and that DW1 and DW2 would probably know about the interim payment certification.

At p 234 of the appeal record:

KLW: Would Mr Low or Me Lee know about interim payment certificate matters?

QUEENIE: By right they should know, Puan dengan izin.

[32] It is the case of the bosses pushing to the staff and the staff feeling rather embarrassed about it. Everybody is keen to wriggle their way out of an unexplained non-certification of the invoices. No explanation has been forthcoming as to why this contractual obligation was not discharged with the result that there was no regular payments other than a paltry sum of RM84,187.43 paid so far. The lackadaisical attitude and the lamentable lack of

interest in certifying can only lead one to conclude that they could not be bothered about making payments to the plaintiff for the works done.

[33] The learned SCJ seemed to have been persuaded by the case of *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] SGHC 107 as authority for the proposition that generally the contractor would have no right to suspend his work for non-payment of interim certificates. However that general proposition is subject to various exceptions. Justice VK Rajah JC (as he then was) was careful to clarify as follows:

> 60 ... It cannot be denied that 'an absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, *without lawful excuse*, is a repudiation' (see Keating on Building Contracts ([57] supra) at para 6–84. The defendant exercised an express right to terminate the contract (see [1]).
>
> 61 The plaintiff also argued that the defendant is precluded from terminating the contract. It raised two quixotic arguments in this context. It first said that a party cannot rely on its own wrong. I have no quarrel with the principle. This principle applies to all facets of the common law and has its origins in Roman law — '*Nullus commodum capere potest de injuria sua propria*'. The principle is explained in the decision of *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 at p 326 thus:
>
> > [H]e cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract.
>
> In short, the plaintiff's position on this issue is tenable only if the non- payment of the 15 November 2000 claim 'caused' the work to stop. The word 'caused' is used here to emphasise the nexus between the cause and effect. A close relationship between these two elements will attract the inference that this principle applies. 'Partial' causation could conceivably justify a suspension but the party invoking the principle will then have to satisfy the court it was reasonable in all the circumstances to suspend work. This is not usually an easy burden to discharge in the instance of 'partial' causation. In the final analysis, *the test is not whether there is complete or partial causation but whether there is effective causation.* Employers or contractors are not in the normal course of events viewed as financial insurers of their contracting parties. *Each case will have to be decided independently and no overarching principle can be stated*.
>
> 62 I have found no factual basis for the plaintiff's belated argument on causation. However, if indeed the failure to pay the 15 November 2000 claim had caused the work to stop, I see no reason in principle why the plaintiff could not have invoked this principle to defeat the defendant's right to terminate the contract and to mount its counterclaim. Despite some misgivings expressed by academics as to whether this principle ought to extend to the non-payment of money as opposed to physical acts of impediment, I believe it stands to reason that the principle is of general application and can be invoked *apropos* all types of disenabling acts. I find the views on this issue, expressed by McMullin J in *Canterbury Pipe Lines Ltd v Christchurch*

Drainage Board [1979] 2 NZLR 347 at p 371, persuasive. (Emphasis added.)

[34] McMullin J in his judgment in *Canterbury Pipe Line Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 at p 371 opined as follows:

> Although I have been unable to find any case where the wrongful withholding of a progress payment has been held to be a breach of the rule that a party to contract shall not profit by his own wrong and, to that extent the judgment may break new ground, there would be no difference in principle between an employer who keeps a contractor out of his land ..., or fails to supply the requisite plans ... and *an employer who keeps his contractor out of payment for work already done, declares his intention to keep him out of payments in the future, ... and requires him to continue with the work.* (Emphasis added.)

[35] May LJ in *Lubenham Fidelities & Investments Co Ltd v South Pembrokeshire District Council and Others* 33 BLR 39 at p 70 alluded to the need to consider all the surrounding circumstances of the case with respect to the nexus between the defaulting act of the employer and the suspension by the contractor as follows:

> We are quite satisfied that there was no legal basis on which the suspension of work could be justified in this case. Nevertheless was there a sufficient link between the issue of the defective certificates and the prolonged suspension of work to support the contention that the issue of the certificates 'caused' the suspension? In answering this question *it is necessary to look at all the surrounding circumstances* ... (Emphasis added.)

[36] The Federal Court in *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83 at p 86 held that a breach in the employer's obligations to make payments to the contractor when they have fallen due may amount to a repudiation of the contract entitling the contractor to sue for payment for the work done. It was observed by Gill FJ (as he then was) as follows:

> In the present case, as was stated by the learned trial judge, the appellants were in breach of their obligation to make fortnightly payments. *Their deliberate refusal to pay what was already due by way of fortnightly payments was an important element on the question of their repudiation of the contract.* Furthermore, they ordered the respondents to stop work. This stoppage of work by them clearly went to the root of the contract. In the circumstances, *the respondents had no option but to treat the contract as at an end and to sue for payment for the work which they had already done*. In our judgment they were entitled to recover the amount claimed either on the basis of work done by them at the appellants' request or by way of damages on the basis of quantum meruit. (Emphasis added.)

[37] Here there is a need for the SCJ to determine if it was a lawful excuse and indeed reasonable for the plaintiff subcontractor to suspend works and finally to stop work altogether if the works they had done was refused

certification by the defendant and if the defendant did not pay the plaintiff other than as and when they chose to and even then, a very patchy payment of a paltry sum. There was no valid excuse or explanation for the refusal to certify the works done as evidenced in the invoices. There was no complaint in writing that the invoices had not correctly reflected the works done and if indeed it is a case where the works were not done or not properly done, one would have expected a response in writing from the defendant as well as a certification for a lesser amount.

Whether the plaintiff is entitled to claim the sum of RM294,709.17 for the work done

[38] The SCJ found as a matter of fact that the plaintiff's claim for the balance sum of RM294,709.17 was not proportionate to the works carried out by the plaintiff at para 35 of her judgment. The SCJ failed to make a finding as to what then is the proper proportion of work done or the value of the work done. At para 42 she found that the plaintiff was duly paid by the defendant based on the actual works carried out.

[39] However the defendant's own documents at p 422 of the appeal record (*Jld* II) show the amount of work done as verified based on the defendant's employer, Conlay's certification to be RM218,848.19 and after deducting RM84,187.43 would leave a balance of RM134,660.76 due and owing to the plaintiff. That statement also captured the work done by the plaintiff until May 2013.

[40] The learned SCJ found as a matter of fact at para 3 of her grounds of judgment that the plaintiff had, prior to the formal subcontract being entered into, entered the site and started work since November 2011. Even going by what the SCJ had held that the plaintiff stopped work in December 2012, then the fact that plaintiff had been paid only RM84,187.43 would indicate that after a year hardly 8% of the works had been completed based on financial progress. Surely for such a delay there would have been some contemporaneous letters or notices to the plaintiff that they had fallen back substantially on the progress of the works. There were no such letters or notices produced before the sessions court.

[41] The SCJ gave credence to the defendant's evidence that the plaintiff only had four workers at the site but the important factor is not the number of workers but whether work has been done according to schedule. No proper accepted schedule of works was produced before the trial court.

[42] The SCJ also took into consideration that under cl 3 of Part V of the subcontract the defendant has the right to withhold payment for all the

unsatisfactory work done and unreasonable claim made by the plaintiff. If indeed the plaintiff had been guilty of that, there was no documentary evidence from the defendant setting out the so-called unsatisfactory work done and the unreasonable claim made by the plaintiff.

[43] The SCJ at paras 26–27 of the grounds of judgment (at p 31 of further record of appeal) had, on her own accord, without counsel having made any submissions on the matter, made the finding that 'since the plaintiff accepted payment made by the defendant for the preliminary works carried out by the plaintiff without objections or challenge is estopped from challenging the manner in which the defendant had certified the claims and the amount paid by the defendant'.

[44] To begin with, this finding was made without the defendant pleading estoppel in the statement of defence. It is accepted that the word 'estoppel' need not be mentioned in the pleadings but that so long as the material facts pleaded supports the fact of estoppel, that would be quite sufficient. However here is a case where the facts supporting the plea of estoppel were not pleaded or adduced in evidence or even submitted upon.

[45] I agree that the plaintiff had been prejudiced because it was not given a chance to argue or rebut this issue of estoppel which was not raised or argued before by the parties.

[46] The *locus classicus* on estoppel is the case of *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 at p 284 where it was summarised at the headnotes as follows:

> It is correct to state that estoppel is a matter which requires to be pleaded under the rules of court, as exemplified by rr 7(1) and 8(1) of O 18 Rules of the High Court 1980. However the requirement of these rules is sufficiently met *if the material facts giving rise to estoppel are sufficiently pleaded* without actually using the term 'estopped'. (Emphasis added.)

[47] Not only were the material facts not pleaded, here it is a case where the plaintiff had no choice but to accept whatever that had been paid even though no proper certification had been done not because it had agreed to no certification but that it had no choice or otherwise the paltry and irregular payments would have been delayed longer. No contractor in the right frame of mind would agree to no certification of its works for then it is at the mercy of the employer to pay as the employer may feel like it. It certainly does not make commercial sense. The plaintiff's witness PW1 ('Badrol') in his witness statement (at p 248 of the record of appeal) stated that he had made many complaints about the late and/or non payments of the interim payments to the defendant.

[48] Both the defendant's witness Mr Lee (at pp 173–176 of the record of appeal) and Mr Law (at pp 193–195 of the record of appeal) agreed that the defendant had breached cl 1 Part V of the subcontract with respect to interim payment certification.

[49] Assuming for a moment that the plaintiff has wrongly terminated the subcontract, it does not mean that they would not be paid for the works already carried out for which the defendant had invoiced its employer. The SCJ would still have to determine the value of the works completed by the plaintiff.

Whether the defendant has proved its claim of damages, losses and back charges in its counterclaim against the plaintiff

[50] The defendant had a counterclaim of RM505,926.39 against the plaintiff. Assuming that the plaintiff had terminated the subcontract unlawfully, has the defendant proved its counterclaim?

[51] The plaintiff also contended that the counterclaim for RM46,859.23 for materials supplied and RM177,139.59 for labour supplied cannot succeed in any event.

[52] The defendant had not been able to point to any agreement, be it written or oral, that the plaintiff would pay the defendant for the labour and materials.

[53] The DW1 readily admitted that there was no proof of agreement between the parties to pay.

Page 198 of the record of appeal:

KLW: Mr Law, pihak defendan tuntut RM46,859 untuk bahan bahan yang di bekal. Mana bukti yang pihak plaintif telah setuju? No no, just say where is the proof?

LAW: Site record sebagai bukti, Puan, site record.

KLW: Do you have the proof in the court today?

LAW: ... yang mereka telah setuju. Site record sebagai bukti yang mereka telah setuju. Hari ini tidak ada.

[54] If the defendant had supplied labour and materials to be used on the defendant's site for the defendant's project then one would have expected the defendant to reduce the plaintiff's scope of work accordingly. As the plaintiff did not claim from the defendant these so called labour and materials supplied, why then should the plaintiff be paying for these two items. If indeed all that

the plaintiff had done was only worth RM84,187.43 which the defendant had paid, then the counterclaim for the RM46,859.23 for materials supplied and RM177,139.59 for labour supplied cannot make sense. Why would the plaintiff have to pay for materials and labour supplied of RM223,998.62 to produce works for which the defendant said is worth the value of RM84,187.43. As this is supplied by the defendant one would have expected nothing wrong with the quality of the material or specifications and nothing unskilled about the labour. The figures just do not add up! There is no commercial sense for anyone to do that kind of a business. At any rate there is no evidence of the parties having agreed on the price of these materials or the rate of the labour. It appeared to have been unilaterally imposed by the defendant.

[55] The plaintiff had ignored the defendant's subsequent letters and debit notes because they had already terminated the subcontract. The defendant cannot imply, much less impose consent to the debit notes issued after the termination of the subcontract just because the plaintiff had not responded to the sums claimed in the debit notes.

[56] It is both mind-boggling and baffling for the defendant to claim RM223,998.62 for a brief period of work but the plaintiff could only claim RM84,187.43 out of the sum of RM378,896 for work done from roughly 1 December 2011–1 April 2013.

[57] The plaintiff had actually in their various letters dated 22 April 2015, 5 May 2015 and 9 July 2015 (pp 410, 416 and 429 of the record of appeal) claimed for the outstanding sum of RM294,709.17 and refuted the defendant's claim for damages.

[58] On top of that there was the defendant's claim of letter of credit issued by the defendant's employer, Conlay, on behalf of the plaintiff, for RM717,142.16. If that is for goods supplied to the plaintiff to do the works then it does not make sense to have this charged to the plaintiff for there is no evidence to show that the plaintiff had invoiced the defendant for this.

[59] There was also the backcharges from Conlay to the defendant for work done by third party contractors of RM289,795.57. As stated the defendant cannot charge to the plaintiff all that which the employer Conlay had charged to the defendant. We do not have the benefit of the contract between the defendant and Conlay in order to know how much that is charged by Conlay is attributable to the plaintiff.

[60] I recall the analysis of such unsubstantiated invoices, debit notes and backcharges by Justice Lim Chong Fong JC in *KC Leong Holdings*'s case at p 33

as follows:

> [63] The defendant's cross-claim is massive comprising of essentially three heads of claim. Firstly there is special damages amounting to RM1,065,370.92 for remedying and rectifying multiple, gross and latent defects as submitted. In this respect, the defendant has in substantiation produced the invoices of her rectification contractors such as Walk & Turn Builders, Shin Tat Construction Trading Sdn Bhd, DJ Deconway Furniture, Itex Power Enterprises, Kim Soon Electrical Engineering, etc that accumulated to that amount. There is no serious dispute that the defendant has paid against these invoices.
>
> [64] On scrutiny of the invoices, I find that the items therein comprise of purported remedial work beyond those dealt under the third issue herein. In other words, there is a lot of other unexplained work. *The defendant has merely collated all her payments made to the rectification contractors and held them entirely to the account of the plaintiff. This is plainly unsatisfactory and does not meet the requirement of proof of damages* as held by the court of appeal in *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229; [2007] 2 AMR 229. In building contract litigation, *I have expected the complainant to carefully sieve through and tabulate each and every relevant defect and the costs of remedying them systematically preferably also in a Scott schedule. The tabulation must cross-refer to the defect as substantiated preferably by photographic records or other cogent mode of proof together with the corresponding item of expenses or costs incurred to remedy the defect as substantiated by the work invoices.* The complainant must in honesty disregard those works that constituted improvement or addition/modification rather than rectification. In short, the complainant cannot 'throw the whole kitchen sink' of alleged unprocessed defects and expenses to the court to have them sorted out as presented by the defendant here.
>
> [65] Moreover, it is incumbent on the defendant to satisfy the court that she has mitigated her damages, see *Kabatasan Timber Extraction Co v Chong Fah Shing* [1969] 2 MLJ 6. The defendant is thus obliged to show that she had acted reasonably in the appointment of the rectification contractors by calling tenders or alternative quotations, otherwise to satisfactorily explain why such steps were not carried out. The defendant has not led any evidence on this aspect. (Emphasis added.)

[61] The defendant cannot charge to the plaintiff the costs of completing the balance works even if it be a case where the plaintiff had wrongfully terminated the subcontract. The defendant must show what is the additional costs that they had incurred in completing the works left unfinished by the plaintiff. It cannot be that the plaintiff has to pay the defendant the whole sum that the defendant had to spend to finish the uncompleted works. It has to be confined to only the additional costs being the difference in the contracted sum and the increased sum. It cannot be the whole of the labour and material costs but the additional labour and material costs. For that one needs to know the percentage of works not completed by the plaintiff and the agreed price for that uncompleted works. Then only can one determine what is the new increased price to complete that uncompleted works.

[62] The way the defendant had presented a breakdown of its counterclaim at p 421 of the appeal record is to add up all the various heads of claim for materials supplied by Conlay, labour and materials supplied by defendant, payments made by Conlay to third parties and other back charges by Conlay and to charge them to the plaintiff as their counterclaim for damages and losses suffered.

[63] The incisive analysis of His Lordship Edgar Joseph Jr SCJ (as he then was) in *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 at p 668 comes to my mind:

> Thirdly, I have kept in the forefront of my mind certain well-established principles in the field of building contract claims; they are conveniently distilled for me by Prof Vincent Powell-Smith and John Sims in their well-regarded book, *Building Contract Claims* (2nd Ed), at pp 136, 137 and 144 as follows:
>
> (1) Loss of profit normally to be expected, which the contractor would otherwise have earned but for the delay or disruption, is an allowable head of claim under the rule in *Hadley v Baxendale*.
>
> (2) However, a contractor would not be entitled to recover an exceptionally high profit on another contract unless this fact were known to the employer at the time the delayed or disrupted contract had been entered into (see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*).
>
> (3) *Additional expenditure on labour, materials* or plant *due to increases in cost during a period of delay* is an allowable head of claim.
>
> (4) *The correct measure would be the difference between what the contractor would have spent on labour, materials and plant and what he has actually had to spend over the whole period of the work as a result of the delay and disruption concerned*.
>
> Also relevant to this part of the case is what Megaw J (as he then was) said in *Wraight Ltd v PH & T (Holdings) Ltd*, a case where a contractor had made a successful claim for loss of profit:
>
> > In my judgment, the position is this: prima facie, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would have made if the contract had been performed, less the money which has been saved to them because of the disappearance of their contractual obligation. (Emphasis added.)

[64] So it is not for the SCJ to merely say that the plaintiff's claim is disproportionate to the works done but to determine what is the portion of works completed by the way plaintiff and the agreed price of the uncompleted works as well as the proof of the extra costs incurred in completing the uncompleted works.

[65] The defendant's counterclaim is in the debit notes issued by the defendant in their letter dated 4 November 2014 to the plaintiff where they had informed the plaintiff that should it fail to issue a response by the end of November 2014, the debit notes will be deemed agreed and confirmed. The relevant part of the letter reads as follows:

> Enclosed herein the list of debit note for your easy references and checking. Should you failed to respond by end of November 2014, SK M&E Bersekutu Sdn Bhd will deem the debit notes given are agreed and confirmed.

[66] The SCJ seemed to have been persuaded by case law that states that if there is no objection to debit notes issued by one to the other, than one would have the basis to conclude that the amount claimed in the debit notes is correct. Those cases that say that can be distinguished for it was in the context of on-going contractual relationship. Where the contract has been terminated one cannot infer agreement to the sum claimed merely because one party has unilaterally imposed a condition that if the other party does not revert within a stated time frame, then there is a deemed admission that the sum claimed in the debit notes is correct. That would be to change the law of contract which requires a *consensus as idem* for there to be a contract. It is different if at the outset the parties had agreed to the deeming provision at the point when the contract was entered into. Likewise if parties by conduct had accepted the goods or the services rendered which had come with the deeming provision. A failure to respond cannot give rise to an imposition of the terms not responded to as part of a contract that is sought to be imposed.

[67] In the case of *Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd* [2014] 10 MLJ 496, it was a specific finding of fact that the plaintiff had by their correspondence and dealings with the defendant, readily accepted the sums due under the debit notes without reservation.

[68] It was in that context that Justice Mary Lim J (now JCA) in dealing with claims pursuant to debit notes issued held as follows at p 525 of the decision:

> Dealing first with the debit notes. In this regard, the plaintiff's own actions in relation to the debit notes, though not acknowledged, but over quite a substantial period July 2008–July 2010, with the meetings and correspondence exchanged between parties, in fact confirms DW1's testimony. The correspondence reveal that the plaintiff itself was not in doubt over the debit notes, the amount stated therein, or what they signify. As seen earlier, *the plaintiff never objected to any of these records but instead, in its correspondence and dealings with the defendant, the plaintiff readily accepted the sums due under the debit notes without reservation*. (Emphasis added.)

[69] By relying totally on debit notes that the plaintiff did not respond to mean the plaintiff have accepted the claims, would result in a miscarriage of justice such that the defendant need not have to prove but that the sum claimed is deemed proved.

[70] It is also not correct for the learned SCJ to state that as DW4 ('Queenie Tan Chai Ling'), who was the account assistant of the defendant, was not cross-examined on the details and amount set out in the debit notes, the said issue is deemed to be admitted. The learned SCJ had relied on the case of *Sin Hong Huat Industries v Berjaya General Insurance Bhd* [2014] 8 MLJ 144 at p 151, where it was held as follows:

> The plaintiff's counsel did not challenge SD2's evidence on this issue during cross-examination. Hence, it is trite law that the plaintiff is deemed to have accepted SD's evidence on this issue.

[71] At p 237 of the appeal record *Jld* I, under cross-examination, DW4 admitted that she was not the person in charged of the subcontract and so she has no personal knowledge of the management or termination of the subcontract.

PRONOUNCEMENT

[72] In the light of all the reasons given above, I had allowed the appeal as the decision of the SCJ could not supported by the evidence adduced and so has to be set aside.

[73] The evidence before the sessions court is totally unsatisfactory with respect to how the sessions court had come to award the whole sum counterclaimed by the defendant of RM505,926.39. Further with respect to the plaintiff's claim the SCJ would have to determine the proportion of the works completed by the plaintiff seeing that the defendant's own documents showed a sum of RM134,660.76 being the value of work done owing by the defendant to the plaintiff at p 422 of the appeal record *Jld* II.

[74] This is not a case where I could make a substitute finding of the amount that could be entered for the plaintiff or for the defendant or for both of them where the claim and counterclaim is concerned. The finding of facts has to be made by a trial judge and the way the evidence has been adduced, assessed and analysed leaves much to be desired such that at the end of the day, the whole of the evidence adduced has not been sufficiently appreciated for the decision arrived at. It would not be tenable for this court to undertake the task of making primary findings of facts in respect of the claim and the counterclaim. See the principle enunciated for a retrial in Court of Appeal case of *Kamdar Sdn*

A *Bhd v Bipinchandra a/l Balvantrai & Ors* [2016] MLJU 974; [2017] 1 CLJ 369.

[75] Very reluctantly I would have to remit the case for a retrial before another judge in the sessions court. The deposit of the appeal is to be refunded to the plaintiff/appellant. No costs is ordered for the appeal.

B

Case remitted for retrial before another sessions court judge with no order as to costs.

Reported by Sivaguru Paramasivam

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